STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED November 20, 2007
v	No. 272596 Calhoun Circuit Court
LANCE EARL FARROW, Defendant-Appellant.	LC No. 06-000027-FC

Before: Talbot, P.J., and Fitzgerald and Kelly, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial convictions for armed robbery, MCL 750.529, kidnapping, MCL 750.349, first-degree home invasion, MCL 750.110a(2), felon in possession of a firearm, MCL 750.224f, two counts of resisting and obstructing a police officer, MCL 750.81d(1), possession of marijuana, MCL 333.7403(2)(d), and four counts of possession of a firearm during the commission of a felony, MCL 750.227b. The trial court sentenced defendant as a second habitual offender, MCL 769.10, to 35 to 65 years in prison for the armed robbery conviction, 35 to 65 years in prison for the kidnapping conviction, 99 to 360 months in prison for the home invasion conviction, 36 to 90 months in prison for the felon-in-possession conviction, 24 to 36 months in prison for each resisting and obstructing conviction, 2 years in prison for each felony-firearm conviction, and 205 days to 6 months in jail for the possession of marijuana conviction. We affirm.

I. Basic Facts

On the morning of December 17, 2005, the victim[1] went out the rear door of his apartment in Battle Creek to smoke a cigarette and let out his dog. The victim encountered a man wearing a ski mask and pointing a gun at him. The assailant forced the victim and his dog back into the apartment at gunpoint and forced the victim to crawl into the bedroom, where a safe was located. The assailant demanded that the victim open the safe, which contained nothing but marijuana paraphernalia. The assailant became angry and searched the victim's dresser until

[1] Although more than one person resided in the home and defendant obtained property belonging to more than one resident of the home, we will refer to the person who was home at the time of the robbery as "the victim."

he found five bags of marijuana and silver digital scales, which he put in his pockets. From a dresser, the assailant took the victim's wallet and several pieces of jewelry belonging to the victim's girlfriend, who also lived in the apartment. At one point, the assailant fired a gunshot near the victim's head because he had pleaded with the assailant not to hurt him. The assailant then retrieved a roll of duct tape from his jacket pocket and used it to "hogtie" the victim while he was lying face down on the floor. After the assailant left the apartment, the victim freed himself and went to the back door, where he observed the assailant running toward a nearby apartment complex. The victim called emergency services, and when the police arrived, he provided a description of the assailant's gun, height, complexion, ski mask, and clothing.

Two police officers saw defendant, who matched the victim's description of his assailant, at the nearby apartment complex. Because the officers learned that the assailant had used a gun in the robbery, they patted defendant down for weapons. One of the officers reached for a "bulge" she noticed in the front of defendant's sweatshirt, and defendant "began pulling away" from them and "swinging his arms," in an attempt to "run away." After defendant was restrained with pepper spray and handcuffs, a search of his person revealed digital scales, five bags of marijuana, a plastic shopping bag, and a black ski mask. The victim and his girlfriend identified the scales and plastic bag as theirs. A maintenance employee at the apartment complex found the victim's wallet and the jewelry belonging to the victim's girlfriend on the ground near the building where defendant was apprehended. On the stairway of the building where defendant was apprehended, the police also found a black handgun matching the victim's description of the one used during the robbery. The victim was taken to the apartment complex, where he positively identified defendant as the assailant.

II. Defendant's Request for Substitute Counsel

Defendant first argues that the trial court abused its discretion when it denied his request for substitution of counsel. We disagree. We review a trial court's decision regarding a request for the substitution of counsel for an abuse of discretion. *People v Traylor*, 245 Mich App 460, 462; 628 NW2d 120 (2001). An abuse of discretion occurs where a trial court's decision falls outside of the range of principled outcomes. *People v Babcock*, 469 Mich 247, 269; 666 NW2d 231 (2003).

The Sixth Amendment affords criminal defendants the right to have counsel of their own choosing. *People v Akins*, 259 Mich App 545, 557; 675 NW2d 863 (2003). However, an indigent defendant is not entitled to have counsel of his choice appointed simply by requesting it. *People v Bauder*, 269 Mich App 174, 193; 712 NW2d 506 (2005). Rather, an indigent defendant must demonstrate good cause and show that substitution will not unreasonably disrupt the judicial process. *Id.* "Good cause exists where a legitimate difference of opinion develops between a defendant and his appointed counsel with regard to a fundamental trial tactic." *Id.*, citing *Traylor*, *supra* at 462. On the first day of trial, before jury selection began, defendant requested substitute counsel because he asserted that his trial counsel had called him a "bastard" for refusing to accept a plea offer and had told him that "it'd be a pleasure for her to see [him] guilty." Defense counsel denied these claims.

A mere allegation that the defendant does not have confidence in trial counsel will not justify substitution. *Traylor*, *supra* at 463. In this case, defendant did not show a genuine issue over the use of a substantial defense or fundamental trial tactic. Rather, on the first day of trial,

he made bald allegations against his counsel's personal treatment of him. Even if defendant had shown that he had a genuine disagreement over the use of a substantial defense or of a fundamental trial tactic, he would still be required to show that the substitution of counsel would not unreasonably disrupt the judicial process. *Bauder*, *supra* at 193. Defendant cannot make the requisite showing where he waited until trial to seek substitute counsel. *People v Echavarria*, 233 Mich App 356, 369; 592 NW2d 737 (1999).

III. Sufficiency of the Evidence

Defendant contends that there was insufficient evidence to support his kidnapping and attendant felony-firearm convictions. When the sufficiency of the evidence is challenged, we review the evidence in a light most favorable to the prosecutor to determine whether any trier of fact could find that the essential elements of the crime were proven beyond a reasonable doubt. *People v Robinson*, 475 Mich 1, 5; 715 NW2d 44 (2006). The standard of review is deferential, and this we are required to draw all reasonable inferences and make credibility choices in support of the jury's verdict. *People v Nowack*, 462 Mich 392, 400; 614 NW2d 78 (2000). Circumstantial evidence and the reasonable inferences that arise therefrom can constitute sufficient proof of the elements of a crime beyond a reasonable doubt. *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999).

A. Defendant's Kidnapping Conviction

Defendant claims that there was insufficient evidence to support his kidnapping conviction. We disagree. There are two types of kidnapping, secret confinement kidnapping and forcible confinement kidnapping. *People v Hoffman*, 225 Mich App 103, 112; 570 NW2d 146 (1997). The elements of secret confinement kidnapping are: 1) that a defendant secretly confines or imprisons another person, 2) willfully, maliciously, and without legal authority, and 3) by force or without consent. *People v Jaffray*, 445 Mich 287, 305; 519 NW2d 108 (1994). As our Supreme Court has stated, a "kidnapping conviction may be based upon proof of confinement that in fact is secret, or upon a showing of forcible seizure or confinement with the intent to secretly confine, even if the confinement did not remain secret." *Id.* at 300-301.

Defendant argues that the victim was not secretly confined, because, shortly after he left the victim, the victim freed himself from the duct tape and telephoned emergency services for assistance. However, when defendant left the victim's residence, the victim was restrained by duct tape in a room with no telephone. Binding a victim is circumstantial evidence of an intent to secretly confine, *People v Warren*, 462 Mich 415, 431; 615 NW2d 691 (2000), and it is appropriate to focus on the channels of communication that are available to the victim, *Jaffray*, *supra* at 307. Although the victim was not confined for a long period, prolonged secrecy is not required; rather, "it is enough that secrecy, or the attempt to maintain secrecy, denied the victim the opportunity to avail himself of outside help." *Id.* "The essence of 'secret confinement' as contemplated by the statute is deprivation of the assistance of others by virtue of the victim's inability to communicate his predicament." *Id.* at 309. We therefore conclude that the prosecutor presented sufficient evidence at trial for a rational jury to convict defendant of kidnapping.

B. Felony-Firearm Conviction

Defendant claims that there was insufficient evidence to support the felony-firearm conviction that was predicated on his kidnapping conviction. We disagree. Felony-firearm consists of two essential elements: (1) the possession of a firearm (2) during the commission of, or the attempt to commit, a felony. MCL 750.227b(1); *Akins*, *supra* at 554. One has constructive possession of a firearm if it is available and reasonably accessible to him, and he knows its location. *People v Williams*, 198 Mich App 537, 541; 499 NW2d 404 (1993); *People v Hill*, 433 Mich 464, 470-471; 446 NW2d 140 (1989). The evidence showed that a handgun matching the description of the one used in the robbery and kidnapping was recovered from the stairway of the building where defendant was apprehended. As is discussed above, there was sufficient evidence that defendant committed secret confinement kidnapping, a felony, and the evidence showed that defendant held a handgun while he was binding the victim with duct tape. Therefore, there was sufficient evidence to sustain defendant's felony-firearm conviction.

IV. Ineffective Assistance of Counsel

Defendant contends, in his supplemental brief filed in propria persona, that he was denied the effective assistance of counsel because his trial counsel failed to present an expert in eyewitness identification at trial. We disagree. Because defendant failed to file a motion for new trial or request a *Ginther*[2] hearing, our review is limited to mistakes apparent on the record. *People v Riley (After Remand)*, 468 Mich 135, 139; 659 NW2d 611 (2003). Whether a defendant has been the denied effective assistance of counsel is a mixed question of fact and constitutional law. *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002). We review a trial court's findings of fact for clear error and questions of constitutional law de novo. *Id.*

To establish ineffective assistance of counsel, a defendant must show that: 1) counsel's performance fell below an objective standard of reasonableness under prevailing professional norms; 2) there is a reasonable probability that, but for counsel's error, the result of the proceedings would have been different; and 3) the resultant proceedings were fundamentally unfair or unreliable. *Bell v Cone*, 535 US 685, 695; 122 S Ct 1843; 152 L Ed 2d 914 (2002); *People v Rodgers*, 248 Mich App 702, 714; 645 NW2d 294 (2001). Defendant bears the heavy burden of overcoming the presumption that counsel's representation was effective. *LeBlanc*, *supra* at 578.

Defendant argues that an expert witness could have effectively attacked the victim's identification of him because the victim focused on the weapon and his confidence conveyed false reliability to the jury. Decisions regarding whether to present an expert witness, particularly one on eyewitness identification, are a matter of trial strategy. *People v Dixon*, 263 Mich App 393, 398; 688 NW2d 308 (2004); *People v Cooper*, 236 Mich App 643, 658; 601 NW2d 409 (1999). Further, the failure to obtain or call a witness constitutes ineffective assistance of counsel only where it deprives the defendant of a substantial defense. *Dixon*, *supra* at 398. Defendant has failed show that his trial counsel was objectively unreasonable for failing

[2] *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973).

to secure the testimony of an expert witness regarding eyewitness testimony. During the cross-examination, defense counsel questioned the victim about the possibility that, on the date of the robbery, there could have been many other people wearing ski masks similar to the mask produced at trial. Defendant's trial counsel challenged the victim's ability to identify the handgun, given his admitted inexperience with handguns and his confidence in his identification. Defense counsel also confronted the victim with discrepancies between his description of the robbery to the police and his description at trial, specifically regarding the assailant's movements within the apartment after he hogtied the victim. Therefore, defendant's trial counsel presented the defense of misidentification at trial, and defendant was not denied the substantial defense of misidentification. Defense counsel's failure to obtain an acquittal using this trial strategy does not constitute the ineffective assistance of counsel. *People v Kevorkian*, 248 Mich App 373, 414-415; 639 NW2d 291 (2001).

Moreover, defendant cannot show that his trial counsel's failure to secure the testimony of an expert in eyewitness identification was outcome determinative. Defendant was apprehended in possession of silver digital scales, five bags of marijuana, a plastic shopping bag, and a black ski mask. The plastic bag and the scales were identified as items that were taken during the robbery, and the amount of marijuana recovered from defendant was consistent with the amount stolen. In addition, defendant was apprehended near the location of the victim's wallet and items of jewelry belonging to the victim's girlfriend, and near a handgun that was similar to the handgun that the victim described to the police. Therefore, on the record before us, defendant has failed to show that he would have been acquitted if defense counsel had presented an expert on eyewitness identification. *Bell*, *supra* at 695.

V. Prosecutor's Withholding of Exculpatory Materials

Defendant argues, in propria persona, that his conviction should be reversed because the prosecutor withheld exculpatory material from him. We disagree. Because defendant did not preserve this issue, we review it to determine whether defendant has demonstrated plain error that affected his substantial rights. *Carines*, *supra* at 763-764. Further, it appears that the police reports submitted on appeal were part of the presentence information report. However, we are unable to verify their inclusion in the report because the PSIR was not submitted on appeal. To the extent that these materials were not included in the PSIR and filed with the lower court, they constitute an improper expansion of the record on appeal. See MCR 7.210(A)(1); *People v Eccles*, 260 Mich App 379, 384 n 4; 677 NW2d 76 (2004).

Criminal defendants have a due process right to obtain "evidence in the possession of the prosecutor if it is favorable to the accused and material to guilt or punishment." *People v Stanaway*, 446 Mich 643, 666; 521 NW2d 557 (1994), applying *Brady v Maryland*, 373 US 83; 83 S Ct 1194; 10 L Ed 2d 215 (1963). In order to establish a *Brady* violation,

> [A] defendant must prove: (1) that the state possessed evidence favorable to the defendant; (2) that the defendant did not possess the evidence nor could the defendant have obtained it with any reasonable diligence; (3) that the prosecution suppressed the favorable evidence; and (4) that had the evidence been disclosed to the defense, a reasonable probability exists that the outcome of the proceedings would have been different. [*People v Cox*, 268 Mich App 440, 448; 709 NW2d 152 (2005).]

Defendant claims that the prosecutor withheld Officer Trista Poole's December 17, 2005, police report, which indicated that the victim did not describe the assailant to the police on the day of the robbery. However, Poole and the victim both testified that, when Poole arrived at the victim's apartment on the day of the robbery, the victim provided a description of the assailant to her. Poole asserted that she broadcast the description over the police radio, but she was not asked to repeat that description at trial. Testimony from other officers, however, showed that the following description was broadcast over the police radio: "[b]lack male, 19 to 20 years of age wearing a dark hooded sweatshirt, dark Carhart jacket and a black ski mask." Given that the victim gave Poole a description and Poole testified that she broadcast the description over the police radio, it follows that this was the description she received from the victim. Further, the copy of the December 17, 2005, report does not contain any statement to support that the victim was unable to describe the perpetrator. Poole testified that she had re-interviewed the victim on December 19, 2005, because she wanted to be sure about whether the assailant's ski mask had three separate holes or one hole with a connected eye and nose area. Defendant has failed to show, on the evidence provided to this Court, that he was deprived of exculpatory evidence. The December 17, 2005, police report was not favorable to defendant, and defendant has failed to show that his possession of the evidence at trial would have resulted in a different outcome. *Cox*, *supra* at 448.

VI. Prosecutorial Misconduct

Defendant argues, in propria persona, that he was denied his due process right to a fair trial when the prosecutor allegedly introduced evidence that defendant's boot matched "bootprints" found near the victim's apartment. We disagree. Because this issue was not preserved, we review it for plain error affecting defendant's substantial rights. *People v Watson*, 245 Mich App 572, 586; 629 NW2d 411 (2001). Further, no error requiring reversal will be found where a curative instruction could have prevented any prejudicial effect. *Id.*; *People v Ackerman*, 257 Mich App 434, 448-449; 669 NW2d 818 (2003).

Defendant claims that the prosecutor asserted that the police matched defendant's boot to a "bootprint" left near the victims' apartment. Defendant's argument is misplaced. Defendant correctly asserts that a prosecutor may not knowingly offer or attempt to elicit inadmissible evidence. *People v Dyer*, 425 Mich 572, 576-577; 390 NW2d 645 (1986). However, he fails to identify, and after a thorough review of the record, we are unable to locate any place in the transcript where the prosecutor made the alleged assertion. We note that, at trial, the prosecutor asked Officer Doug Graham to describe his involvement in the investigation, to which Officer Graham replied, "I stayed with the suspect at the station until the crime techs requested that I bring a pair of his shoes out to the scene so they can match it [sic] with footprints in the snow." However, Officer Graham never affirmatively testified that defendant's boots matched the prints in the snow. Further, during the cross-examination of Officer Nichole Marshall, defense counsel asked her whether she attempted to "locate a footprint in the snow with a similar marking [to defendant's] boot." Officer Marshall replied that she was unable to find such a print because "[t]here were too many footprints in the area to be able to try and find one." Therefore, defendant has failed to show that any misconduct occurred.

VII. Defendant's Arrest and The Evidence Obtained

Defendant argues, in propria persona, that he was illegally arrested because the officers lacked probable cause. We disagree. Because defendant failed to preserve this issue, we review it for plain error affecting defendant's substantial rights. *Carines*, *supra* at 763; *People v Watson*, 245 Mich App 572, 586; 629 NW2d 411 (2001).

Both the United States and Michigan Constitutions guarantee the right against unreasonable searches and seizures. US Const, Am IV; Const 1963, art 1, § 11; *People v Kazmierczak*, 461 Mich 411, 417; 605 NW2d 667 (2000). For a custodial arrest to be valid, the arresting officers "must possess information demonstrating probable cause to believe that an offense has occurred and that the defendant committed it." *People v Champion*, 452 Mich 92, 115; 549 NW2d 849 (1996); *People v Dunbar*, 264 Mich App 240, 250; 690 NW2d 476 (2004). Probable cause to arrest arises when "the facts and circumstances within an officer's knowledge and of which he has reasonably trustworthy information are sufficient in themselves to warrant a man of reasonable caution in the belief that an offense has been or is being committed." *Champion*, *supra* at 115.

The arresting officers heard over the police radio system that a home invasion had occurred and the assailant had fled. The evidence shows that, contrary to defendant's assertions and misplaced reliance on Poole's December 17, 2005, police report, the victim provided a detailed description of his assailant, including details about his height, complexion, clothing, ski mask, and gun. The evidence showed that the following description was broadcast over the police radio: "[b]lack male, 19 to 20 years of age wearing a dark hooded sweatshirt, dark Carhart jacket and a black ski mask." The arresting officers then heard over the police radio system that a suspect who matched this description was walking through a parking lot and "cutting between the buildings" in the apartment complex. When the arresting officers arrived at the apartment complex, they were informed that a suspect matching that description had entered one of the buildings. After they entered the building, they saw defendant, who matched the description. Therefore, the officers were aware that a crime had occurred, and they had probable cause to believe that defendant had committed it. See *Champion*, *supra* at 115; *Dunbar*, *supra* at 250. Defendant's arrest was valid, and the search was properly conducted as a search incident to arrest, even though it occurred before the arrest. *Champion*, *supra* at 115-116.

Even if we were not convinced that the officers had probable cause to arrest defendant when they first saw him inside the apartment complex, we are satisfied that they had "reasonable suspicion that criminal activity may be afoot." *Terry v Ohio*, 392 US 1, 30-31; 88 S Ct 1868; 20 L Ed 2d 889 (1968). Reasonable suspicion requires less than the level of suspicion required for probable cause, and the officers in the instant case clearly had a particularized suspicion, based upon the objective information regarding the home invasion and description of the assailant, that defendant had been engaged in criminal activity. *Champion*, *supra* at 98; *Dunbar*, *supra* at 247. Given that the items discovered during the "pat down" search consisted of contraband and items reported missing in a recent home invasion, the arresting officers had probable cause to arrest defendant at that point. Therefore, the search and arrest were both valid, and reversal is not warranted.

Affirmed.

/s/ Michael J. Talbot
/s/ E. Thomas Fitzgerald
/s/ Kirsten Frank Kelly